IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 10441 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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Versus

NARAYANBHAI KALUBHAI BHAMRE

Appearance:

1. Special Civil Application No. 10441 of 2001

MR SP HASURKAR for Petitioner No. 1

MR AK CLERK for Respondent No. 1

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 19/03/2002

ORAL JUDGEMENT

#. Heard Mr.S.P.Hasurkar, learned advocate appearing on behalf of the petitioner Board and Mr.A.K.Clerk, learned advocate for respondent - workman.

#. The petitioner Board has challenged the award passed

by the Labour Court, Surat in Reference No.795 / 1995 dated 3rd March, 2001, wherein Labour Court has granted reinstatement with continuity of service without backwages of the interim period. On date 7th November, 2001, this Court has issued notice to the respondent and granted ad-interim relief in terms of para-6[B] subject to provisions of Section 17-B of the Industrial Disputes Act. Thereafter, this matter is taken up for final hearing on admission stage. Hence, RULE. Learned advocate Mr.A.K.Clerk waives service of Rule on behalf of the respondent workman.

#. Learned advocate Mr.Hasurkar on behalf of the petitioner Board has submitted that the labour court has committed error in coming to the conclusion that inquiry was not initiated before terminating services of the respondent workman and therefore, it amounts simple termination and hence, Section 25-F of the Industrial Disputes Act, 1947 was required to be complied with by the petitioner Board. Mr.Hasurkar, learned advocate has therefore, submitted that this conclusion is erroneous that there was no compliance of Section 25-F of the I.D.Act, 1947 as it was not retrenchment of the workman. Mr.Hasurkar, learned advocate has further submitted that before terminating services of the respondent workman, three notices viz. 18th November, 1989, 27th November, 1989 and 8th December, 1989 were served but despite this, no response was given by the respondent workman and therefore, ultimately services of the respondent workman came to be terminated on 10th January, 1990 under the provisions of Service Regulation 113 of the Gujarat Electricity Board. Therefore, the order of termination passed by the petitioner Board is legal and valid one and interference by the labour court under Section 11-A of the I.D.Act is erroneous and without jurisdiction. Mr.Hasurkar, learned advocate has relied on Service Regulation 113 produced before this Court and pointed out that service regulation has been enacted under the powers of the Electricity Act and it having statutory force and therefore, the powers of summarily terminating services of the workman are with the petitioner Board and same are exercised rightly by the petitioner Board and hence, no illegality has been committed by the petitioner Board while terminating service of the respondent workman. Learned advocate Mr.Hasurkar has also submitted that while exercising the powers under Service Regulation 113, question of holding inquiry does not arise and therefore, the labour court has committed basic error which requires to be interfered with by this Court while exercising the powers under Article 226 and 227 of the Constitution.

#. Learned advocate Mr.A.K.Clerk on behalf of the respondent workman has submitted that looking to the termination order dated 10th January, 1990 itself, it clearly transpires that because of the misconduct committed by the the respondent workman, powers under Service Regulation 113 has been exercised without holding any departmental inquiry against the respondent workman. Therefore, it is submitted that once the misconduct is alleged, then the employer must hold inquiry to prove that the charge against the respondent workman, otherwise, it amounts to denial of reasonable opportunity to the respondent workman, which is contrary to the principles of natural justice. This fact has been undisputed between the parties that before terminating services of the respondent workman, no departmental inquiry was initiated by the petitioner Board. Therefore, Mr.Clerk submits that order of termination is contrary to the principles of natural justice and the labour court has rightly exercised the powers under Section 11-A of the Industrial Disputes Act, 1947 and not granted backwages but only granted reinstatement with continuity of service and therefore, the labour court has not committed any error while granting relief of reinstatement with continuity of service to the respondent workman which need not require to be interfered with by this Court while exercising the powers under Article 226 and 227 of the Constitution.

#. I have considered submissions of the learned advocates for the parties. The respondent workman was working as Watchman in Security Department with effect from 28th March, 1983. According to him, the Officer of the Board were harassing him and there was strain relation between the respondent and the petitioner Board. Ultimately, services of the workman was terminated on 10th January, 1990 under Service Regulation 113 of the petitioner Board. The workman raised industrial dispute which was referred for adjudication on 17th November, 1995. Before the Labour Court, statement of claim was filed vide Exh.7 and written statement was filed at Exh.8 by the petitioner Board. Thereafter, vide Exh.9 the petitioner Board has produced certain documents relating to the payment made to the respondent in respect of gratuity and P.F.Amount. The petitioner Board has again produced certain documents vide Exh.10 and 11. The petitioner Board has produced xerox copy of the Service Regulation 113 vide Exh.14 and thereafter, the respondent workman was examined vide Exh.15 before the labour Court. The petitioner Board has examined one witness vide Exh.26 Jaysingh Fakirbhai Chaudhari and thereafter, the

petitioner Board has produced certain documents vide Exh.25 / 28 and on that basis, examination of the respondent workman was again open and thereafter, it was closed vide Exh.59. The petitioner Board has closed its evidence vide Exh.60 and 61. Thereafter, the labour court has considered the merits of the matter. The labour court has examined two questions; whether termination is based upon misconduct or allegation or not; and in that case, whether regular departmental inquiry is necessary or not. The second question which was examined that in case if termination is simplicitor, then Section 25-F of the I.D.Act has been violated by the petitioner Board or not. This Court has perused the entire award passed by the labour court. The labour court has rightly examined and decided these two questions. The labour court has come to the conclusion that the respondent workman was working as Watchman in Security Department and there was some strain relation between the workman and officers and therefore, the officers had not allowed the respondent workman to resume the duty and service record has been made bad. The respondent workman had deposed before the labour court that against him, one police case was filed about theft of tins and during pendency of criminal case, officers of the petitioner Board were not allowing the respondent workman to resume duties. Thereafter, he was on leave for period of five to six days for the cause to visit village but thereafter, the respondent workman was not allowed to resume duty and his services came to be terminated under Service Regulation 113 without giving any opportunity to him. Thereafter, the labour court has considered that termination is either punitive or simplicitor. In case of punitive termination, departmental inquiry is condition precedent but in case of simplicitor termination, Section 25-F of the I.D.Act, 1947 has to be followed. Therefore, the labour court has come to the conclusion that the petitioner Board has not held departmental inquiry though it was specifically mentioned in the termination order that his services came to be terminated on account of misconduct committed by the respondent workman to remain absent without prior permission of the concerned authority. Therefore, termination order has been held to be illegal. The labour court has further considered that in case if Service Regulation provides that no detailed departmental inquiry is necessary if the employee remains absent without prior permission, then it amounts to simple termination covered by the definition of the retrenchment under Section 2[OO] of the Industrial Disputes Act, 1947 and in such circumstances, Section 25-F of the I.D.Act, 1947 is required to be followed, which is undisputedly

not followed by the petitioner Board. Therefore, the labour court has, on both these counts, come to a right conclusion and the labour court has not committed any error while coming to such conclusion, which requires any interference by this Court under Article 226 and 227 of the Constitution. It is also noticed that the labour court has given cogent reasons in support of its conclusion and rightly denied backwages of the interim period to the respondent workman. The labour court has applied its mind and examined the merits on the basis of the documentary and oral evidence led and produced before the labour court. This Court can not reappreciate the evidence which was appreciated by the labour court. Therefore also, according to my opinion, there seems no infirmity in the award which calls for any interference of this Court under Article 226 and 227 of the Constitution.

#. Now if this Court considers the question in detailed that whether the petitioner Board is entitled to terminate service of the employer who remained absent for pretty long time without holding any inquiry and whether the petitioner Board is right to exercise the powers in such situation under Service Regulation 113 of the Service Regulations of the petitioner Board. The relevant Service Regulation is quoted as under :-

> "113. Continued absence from duty or overstay, inspite of warning, to return to duty, shall render the employee liable to summarily discharged from service without the necessity of proceedings under the Gujarat Electricity Board Conduct, Discipline and Appeal Procedure."

#. In light of this Service Regulation, it is pertinent to note that wording of termination order dated 10th January, 1990. In the said termination order, the petitioner Board has mentioned that the respondent workman has remained absent with effect from 26th December, 1989 to 29th December, 1989 and thereafter, he further remained absent without any prior permission of the concerned authority. Inspite of three notices served on the respondent workman, no reply has been given as per the case of the petitioner. Therefore, to remain without prior permission is considered to be misconduct and considering this misconduct, powers has been exercised by the petitioner Board under Service Regulation 113 of the Gujarat Electricity Board. This specific word `misconduct' has been incorporated in the order of termination and on the basis of this misconduct, powers

has been exercised by the petitioner Board. Therefore, the question is whether the petitioner Board is entitled to terminate services of any permanent employee for such misconduct without holding departmental inquiry. This very aspect has considered by the Apex Court in case of M/S SCOOTER INDIA LTD MOHAMMAD YAQUB AND ANOTHER reported in 2001 Lab.I.C. pg.71. The Apex Court has observed that termination of services on the basis of over staying of leave, cannot result in automatic termination of service, Standing Order providing for such automatic termination without affording opportunity of hearing to employee is bad. In this decision, the Apex Court has considered earlier two decisions viz. [1] Uptron India Ltd. V. Shammi Bhan, reported in 1998 SC 1681 and [2] Scooter India Vs. Vijay E.V.Eldred reported in 1998 [6] SCC 549. The Apex Court has observed this aspect after considering aforesaid two decisions in para 10, 11 and 12, which are referred as under :-

"10. We are in complete agreement with the ratio laid down in this case as well as the observations made by this Court in respect of the stray observations in Scooter India's case [supra].

11. Therefore, it is clear that there could not be any automatic termination of the respondent on the basis of Standing Order 9.3.12. Principles of natural justice had to be complied with.

12. The question which then arises is whether the principles of natural justice were followed in this case. As has been set out hereinabove Mr. Swarup had submitted that the workman had been given an opportunity to join the duty and that he did not join duty even though repeatedly called upon to do so. It is contended that principles of natural justice have been complied with in this case. However, the material on record indicates otherwise. The labour court in its award sets out and accepts the respondent's case that he had not been allowed to join duty. The respondent has given evidence that even though he personally met Chief Personnel Officer he was still not allowed to enter the premises. The evidence is that in spite of slip Ext. W.2 he was prevented from joining duty when he attempted to join duty. The slip Ext. W.2 had been signed by the Security Inspector of the Appellant. This showed that the respondent had

reported for work. As against this evidence the appellant has not led any evidence to show that the workman had not reported for duty. Even though the slip Ex.W-2 had been proved by the workman, the Security Inspector, one Mr.Shukla, was not examined by the Appellant. Further the evidence of the Senior Time Keeper of the Appellant established that the workman had worked for more than 240 days within a period of 12 calender months immediately preceding the date of termination of service. This was proved by a joint inspection report, which was marked as Exh.45/A. It was on the basis of this material and this evidence that the Labour Court came to the conclusion that there was retrenchment without following the provisions of law. As the workman was not allowed to join duty, Standing Order 9.3.12 could not have been used for terminating his services."

#. This aspect has also been examined by the Apex Court in case of NEPAL SINGH V. STATE OF U.P. reported in AIR 1985 SC pg.84. The Apex Court has observed that termination of service of temporary Sub Inspector of Police, the order based on mere allegations and on unspecific and vague grounds, order liable to be quashed. The relevant observations made in para-10 are reproduced as under :-

"10. Processing from there, we may advert to a further aspect of the case. It would seem that the dominating factor which influenced the mind of the Deputy Inspector General of Police was the allegation that the appellant had married a second wife against the Government Servant's Conduct Rules. It is clear that a full fledged enquiry was instituted into the matter, evidence was recorded but before any findings could be rendered the enquiry was dropped for want of jurisdiction. No attempt was made thereafter to institute a proper enquiry by the appropriate authority. In the circumstances, it was not open to the Superintendent of Police to mention in his report, as a statement of fact, that the appellant had married a second time against the Government Servants' Conduct Rules. With the dropping of the enquiry the allegation remained unverified. We may observe that where allegations of misconduct are levelled against a Government servant, and it is a case where the provisions of Art.311[2] of the Constitution

should be applied, it is not open to the competent authority to take the view that holding the enquiry contemplated by that clause would be a bother or a nuisance and that therefore, it is entitled to avoid the mandate of that provision and resort to the guise of an ex facie innocuous termination order. The Court will view with great disfavour any attempt to circumvent the constitutional provisions of Article 311[2] in a case where that provision comes into play."

#. The Apex Court has also considered this aspect in case of OM PRAKASH GOEL V. HIM PRA. TOURISM DEVELOPMENT CORPN LTD. reported in AIR 1991 SC 1490. Relevant observations made in para-9 are much relevant, which are quoted as under :-

"5. It is not in dispute that a regular chargesheet was served on the petitioner, as mentioned above, on 21st August, 1981 and to the said charge-sheet a list of documents also was appended on the basis of which the articles of charges were framed. The petitioner replied to these charges on 7th September, 1981. Without reference to any of the charges or the reply the order of termination was passed on 8th January, 1982 as already mentioned. In the counter affidavit at more than one place it is admitted about the framing of the charges etc. regarding the news item which refers to the information given out by the petitioner. It is stated in the counter affidavit that services of the petitioner were terminated as a probationer and not on the basis of the enquiry report which came after the services of the petitioner had been terminated. It can therefore be seen that an enquiry, in fact, was contemplated and was held but the report came into light after termination of the services of the petitioner. It is also submitted on behalf of the petitioner that the audit report would show many irregularities as pointed out by the petitioner and that the petitioner acted honestly in pointing out the irregularities. It is not necessary for us to go into this question. Having gone through the various records and also the admissions made in the counter affidavit, we are satisfied that the termination order, though appears to be innocuous, was only intended to punish the petitioner for the misconduct, in respect of the allegations which are mentioned in the charges that were served on him. After

serving the chargesheet, as a matter of fact, the enquiry was conducted. But before the conclusion of the enquiry the termination order was passed, Therefore it is not difficult to see that the form of the termination order is only a cloak for an order of punishment."

#. The decision of the Apex Court in case of D.K.YADAV vs. J.M.A. INDUSTRIES LTD. reported in 1993 [2] LLJ 696 has directly covered the issue involved in the present petition. The Apex Court has observed that it is well settled that right of life enshrined under Article 21 of the Constitution of India would include right to livelihood. The order of termination visits with civil consequence of jeopardizing not only the worker's livelihood but also the career and livelihood of the dependents. Therefore, before takin any action of putting an end to the tenure of an employee, fairplay requires that a reasonable opportunity to put forth his case is given and domestic enquiry conducted complying with the principles of natural justice.

##. Recently also, in case of MAJOR SINGH V. STATE OF PUNJAB reported in 2001 AIR SCW 2272, the question has been considered by the Apex Court. The order discharging Constable from service casting aspersions on constable regarding his conduct, mentioning that he is in habit of remaining absent for which he has been warned by superior, earlier service record and punishments imposed also mentioned, order of discharge is not an order simpliciter. But was by way of penalty and amounts to dismissal and appropriate enquiry under rule is required to be initiated. The relevant observations made by the Apex Court in this judgment in para-6 to 8 are reproduced as under :-

"6. If any order under Rule 12.21 has to be passed which can stand scrutiny of Court and can be said to be legal, valid and falling within the fourcorners of the said rule without casting any aspersion or stigma on the person concerned, simpliciter mentioning that his work as constable is found not satisfactory, can suffice. But that, unfortunately, is not the language in which the impugned order was couched. It went beyond the four corners of Rule 12.21 and clearly stigmatised the appellant and tried to dismiss him from service for the alleged misconduct for which appropriate enquiry under Rule 16.24 against the appellant was required to be

initiated. It is interesting to note that such an enquiry was initiated but was intercepted and was given a go-by for un-understandable reason. Consequently, even on merits the impugned order in second appeal cannot be sustained. Even apart from that, in second appeal in the light of concurrent findings of fact reached by the trial court and the First Appellate Court on the nature of the impugned order passed against the appellant, without framing any substantial question of law, the learned single Judge could not have exercised jurisdiction under Section 100, Code of Civil Procedure.

7. It is now well settled by a catena of decisions of this Court that in order to be treated as an order of discharge simpliciter it on the face of it should not cast any aspersion or stigma on the person concerned an he must simply be told off the gates on the ground of unsatisfactory work. Rule 12.21 itself fell for consideration of this Court in the case of State of Haryana v. Jagdish Chander [1995] 2 SCC 567 : [1995 AIR SCW 964 : AIR 1995 SC 984]. This Court clearly observed that the findings of habitual absence and indiscipline necessarily cast a stigma on the career of the delinquent and would be an impediment for any future employment elsewhere. Consequently, such an order could not be sustained under Rule 12.21 of Punjab Police Rules.

8. The aforesaid decision squarely applies to the facts of the present case. It is unfortunate that this decision, though rendered as early as in 1995, was not brought to the notice of the learned Single Judge who decided the second appeal in the present case in August, 1998. We are sure that if the aforesaid judgment was brought to the notice of the learned single Judge he would have come to the correct conclusion on the facts of the present case. For all these reasons, therefore, this appeal is allowed. The impugned order of the High Court in Second Appeal is set aside. The decree passed by the trial Court and as confirmed by the first appellate Court shall stand confirmed."

##. Recently also, the Division Bench of the Allahabad High Court has considered similar issue in case of SUNIL KUMAR PATHAK V. INDIAN OIL CORPORATION reported in 2001

Lab.I.C. 3518, wherein the head notes says that Constitution of India Article 16 - Indian Oil Corporation Ltd. [Conduct, Discipline and Appeal] Rules 1980, R-8 Overstaying on leave without prior intimation, clause providing for treating of service of such employee as voluntarily abandoned, is violative of Article 14 and order declaring services of employee as abandoned without affording opportunity to hearing to him liable to be quashed. Relevant observations made in para 15 & 16 are quoted referred as under :-

"15. The respondents are relying on Clause 8 of the Indian Oil Corporation Ltd [Conduct, Discipline and Appeal] Rules 1980 which state that if an employee overstayed leave beyond the period of leave originally granted or subsequently extended or is otherwise absent beyond 21 days continuously without prior permission or intimation he shall be treated to have voluntarily abandoned the Corporation's service.

16. In our opinion the facts of the case are squarely covered by the decision of the Supreme Court in D.K.Yadav v. J.M.A. Industry Ltd. [1993] 3 SCC 259. In the view of the said decision Clause 8 of the Rules is clearly violative of Article 14 of the Constitution and the petitioner should have been given opportunity of hearing in an enquiry after chargesheeting him. Since that was not done the impugned order dated 20-5-1997 Annexure 1 to the petition is clearly illegal and is hereby quashed."

##. In view of above observations made by the Apex Court in above referred cases and considering the order of termination dated 10th January, 1990, wherein it is specifically mentioned word "misconduct" and for that, powers have been exercised under Service Regulation 113 and therefore, in such situation, the order of termination has been passed by the petitioner Board without affording any opportunity to the respondent workman and without holding any departmental inquiry under the Service Rules, then, the order of termination is rightly set aside by the labour court. The labour court has considered the entire evidence led before him and ultimately come to the conclusion that the order of termination is contrary to the principles of natural justice. Therefore, according to my opinion, the labour court has considered all the aspects of the matter and

the labour court has rightly granted reinstatement in favour of the respondent workman with continuity of service not awarding the backwages to the respondent workman for the interim period. Therefore, according to my opinion, the labour court has not committed any error and as such, there seems neither jurisdictional error nor any procedural irregularity apparently face on the recorded committed by the labour court and therefore, no interference of this Court is called for while exercising the powers under Article 226 and 227 of the Constitution.

##. However, lastly the contention raised by the learned advocate Mr.Hasurkar that the labour court has come to the conclusion that such termination amounts to simpliciter and therefore, such action of the petitioner Board falls within definition of `retrenchment' and therefore, prior to termination, Section 25-F of the I.D.Act, 1947 is required to be followed by the petitioner Board and therefore, the conclusion of the labour court is erroneous as the respondent workman remained absent and inspite of three notices, he had not reported and that is how the petitioner has exercised the powers under Service Regulation 113 of the Gujarat Electricity Board. So far this contention is concerned, in view of this Court, there are two type of terminations, one is by simpliciter and another by way of stigma or allegation. In case of simpliciter termination, which amounts to retrenchment within meaning of Section 2[oo] of the Industrial Disputes Act, 1947. However, if services of the permanent employee has to be terminated and no stigma is attached against his termination or allegation is not foundation, then it amounts to retrenchment, then Section 25-F of the I.D.Act, 1947 is required to be followed, which is admittedly not followed in the present case. In case of termination based on misconduct or stigma is attached to termination, then departmental inquiry is condition precedent. On the case on hands, no reasonable opportunity was given to the respondent workman before terminating services of the concerned workman. Therefore, conclusion of the labour court that either the petitioner board has to comply provisions of the principles of natural justice by way of holding inquiry and giving reasonable opportunity to the respondent workman before terminating services or they should have to comply the provisions of Section 25-F of the Industrial Disputes Act, 1947, according to my opinion, it is correct conclusion arrived at by the labour court based on very well settled principles laid down by the Apex Court and therefore, according to my opinion, the labour court has not committed any error in coming to

such conclusion.

##. It is also pertinent to note that this Court is having very limited powers under Article 226 and 227 of the Constitution of India. This Court cannot be act as an appellate authority. However, it is settled position of law that the powers of this Court are very limited while examining the legality and validity of the award passed by the labour court. The view taken by the Apex Court in Indian Overseas Bank v. I.O.B. Staff Canteen Workers' Union and Another reported in 2000 SCC [Labour and Service] pg.471, the Apex Court has held that while exercising the powers under Article 226 and 227 of the Constitution, interference with pure finding of fact and Reappreciation of the evidence is held to be impermissible. The High Court does not exercise appellate jurisdiction under Article 226. Even insufficiency of evidence or that another view is possible, it is held that no ground to interfere with the findings of the Industrial Tribunal. Recently also, the Apex Court has considered this aspect in case of SUGARBAI M. SIDDIQ AND OTHERS V. RAMESH S. HANDKARE reported in 2001 [8] SCC pg.477, the Apex Court has held that scope of powers of High Court is concerned not with the decision of the lower court / tribunal but with its decision-making process. High Court must ascertain whether such Court or tribunal had jurisdiction to deal with a particular matter and whether the order in question is vitiated by procedural irregularity, then only High Court can interfere with, otherwise, not.

##. In view of above discussion and the observations made by the Apex Court, this Court has limited powers while examining the legality and validity of the award in question. However, Mr.Hasurkar, learned advocate for petitioner Board has also failed to point out any other infirmity in the award challenged before this Court and therefore, there is no substance in this petition and the same is dismissed accordingly.

##. Learned advocate Mr.A.K.Clerk on behalf of the respondent workman has submitted that some suitable directions may be issued on the petitioner for implementing the award in question within some reasonable time. Learned advocate Mr.Hasurkar on behalf of the petitioner Board has submitted that the petitioner Board will implement the award in question in favour of the respondent workman within period of one month from the date of receiving a copy of this order. Therefore, it is directed to the petitioner Board to reinstate the respondent workman with continuity of service without any

backwages of the interim period in terms of the award with effect from the date of award within period of one month from the date of receiving a copy of this order.

Rule discharged. Ad-interim relief, if any, stands vacated. No order as to costs. Direct Service to respondent workman is permitted.

Date : 19-3-2002 [H.K.Rathod, J.]

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